IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR
:::

ORDER

Amrit Lal Taya vs Vishwa Nath & Ors.

S.B. CIVIL WRIT PETITION NO.503/2007 UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

Date of order :: 1.10.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

REPORTABLE

Mr.RK Thanvi, for the petitioner.
Mr.MS Singhvi, for the respondent no.2.
Mr.Rajesh Joshi, for the respondent no.7.

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BY THE COURT :

Heard learned counsel for the parties on application filed by respondent no.2 under Article 226(3) of the Constitution of India for vacating the interim order granted by this Court dated 12.2.2007.

Brief facts of the case are that plaintiff-petitioner filed the suit for specific performance of contract dated 2nd April, 1978 in the trial court on 23rd Jan., 1982. The petitioner-plaintiff sought amendment of the plaint twice before present application for amendment of plaint third time was filed in the trial court on 22nd Dec., 2006, i.e., after about more than 24 years. The plaintiff's original suit

contained specific pleading of the plaintiff that the plaintiff entered into contract for purchase of the property on 2nd April, 1978 and this agreement is oral one. Apart from above pleadings, the plaintiff's case is that despite plaintiff's insistence, the defendants did not agree to execute the written agreement. After 24 years from the time of filing of the suit, on 22nd Dec., 2006 the plaintiff submitted an application for amendment of the plaint stating therein that oral agreement was entered into on 2nd April, 1978 and the plaintiff paid Rs.10,001/- to the defendants-vendor on the same day i.e., 2nd April, 1978. Self-contradicting his own specific admission in the plaint, in the application, the plaintiff stated that the agreement dated 2nd April, 1978 was reduced in writing on 21st Feb., 1980. In the application, only reason given for not mentioning the fact in original or amended plaints is that out of mistake (सहवन) and due to over site the plaintiff could not mention this fact of written agreement dated 21nd Feb., 1980 in the plaint. Therefore, plaintiff prayed that plaintiff be permitted to incorporate the plea that after 2nd April, 1978, one of the trustees of the alleged vendor trust confirming the alleged oral agreement dated 2nd April, 1978 executed a written agreement on 21st Feb., 1980 in favour of the plaintiff, therefore, defendants are bound to follow the agreement dated 2nd April, 1978 and its writing dated 21st Feb., 1980.

Before the said application for amendment was submitted it is stated by learned counsel for the respondent that an application for

seeking permission to produce the said written agreement dated 21st Feb., 1980 was submitted before the trial court and that was rejected by the trial court by separate order. Learned counsel for the petitioner further pointed out that to challenge that order, the petitioner has already preferred writ petition before this Court and which is pending.

The trial court dismissed the petitioner's-plaintiff's application for amendment of the plaint filed under Order 6 Rule 17 CPC on the ground that by this amendment, two contradicting plea will come in the plaint and therefore, that cannot be allowed. The trial court was of the view that plaintiff cannot withdraw his admission in plaint by amendment. Further, the trial court held that the application has been filed after delay of 25 years from the time of filing of the suit. Substantially, on these grounds, the plaintiff's application was dismissed with cost of Rs.2,000/-. The petitioner has challenged the said order of the trial court dated 10.1.2007 by preferring this writ petition wherein the interim order was passed by this Court on 12th Feb., 2007.

The respondent no.2,who is one of the trustees -defendants has filed the application for vacating the interim order and this prayer was supported by the respondent no.7, who has agreement to sell in his favour and states that the respondent no.7 is in possession of the property.

Learned counsel for the respondent no.2 submitted that the

suit was filed in the year 1982 for specific performance of contract dated 2nd April, 1978 with specific plea that there was oral agreement only and the defendants refused to execute the written agreement. Now by way of amendment after 24 years, the plaintiff wants to plead that there was written agreement. The application could have been dismissed only on this count alone of inordinate delay of 24 years apart from the fact that plaintiff is not entitled to withdraw his admission about only oral agreement nor can take plea against his own admission that there was only oral agreement and further that defendants refused to execute written agreement. It is also submitted that in fact, the first cause of action is founded upon the oral agreement dated 2nd April, 1978 and if according to the plaintiff, it has been reduced in writing giving a complete concluded agreement to sell between the parties on 21st Feb., 1980 then that is a separate cause of action and the suit for specific performance of that contract in the year 2006 is hopelessly barred by time and therefore also, the amendment could not have been allowed. It is also submitted that amendment has been sought when the alleged attesting witness of the deed has already died which also shows the lack of bonafide of the plaintiff. It is also submitted that the plaintiff filed the application for delaying the suit which is proved from the fact that suit was filed in the year 1982 and yet the plaintiff's evidence only started and then the frivolous application has been filed for amendment of the plaint. Learned

counsel for the respondent further submitted that most of the trustees of the trust are of the advance age and that is also a relevant fact because of which the plaintiff wants to delay the suit.

Learned counsel for the respondent no.7 vehemently submitted that it is not a case of taking inconsistent plea by the plaintiff but is a case of withdrawing admission made in the pleading by the plaintiff.

Learned counsel for the petitioner vehemently submitted that this Court issued notices for final disposal of the writ petition and notices have not been served upon all the respondents despite the fact that petitioner has submitted requisite process fees as well as requisite summons for sending the notices by registered post and, therefore,the writ petition cannot be decided at this stage and both the respondents miserably failed to show that prejudice and hardship is going to cause them by continuing the interim order whereas in case, the stay order will be vacated then serious prejudice is likely to be caused to the petitioner. It is also submitted that application under Article 226(3) of the Constitution of Indian can be allowed only on showing the reason for setting aside the interim order which was passed by this Court though ex-parte but after hearing the petitioner on 12.2.2007.

Learned counsel for the petitioner on merit argued and relied upon the several judgments of the Hon'ble Supreme Court which are: *(i) State of A.P. & Ors. Vs. M/s. Pioneer Builders, A.P.(2007(1)*

Apex Court Judgments 022 (SC)), (ii) Rajesh Kumar Aggarwal & Ors. Vs. K.K. Modi & Ors (2006(3) RLW 1882), (iii) Pankaja & Anr. Vs. Yellappa (D) by Lrs and Ors. (AIR 2004 SC 4102), (iv) Rajesh Kumar Aggarwal & Ors. Vs. K.K. Modi & Ors. (AIR 2006 SC 1647), (v) Fritiz T.M. Clement & Anr. Vs. Sudhakaran Nadar & Anr. (AIR 2002 SC 1146), (vi) Raj Kumar Vs. Dipender Kaur Sethi (AIR 2005 SC 1562)and (vii) G. Nagamma & anr.Vs. Siromanamma & anr. ((1996) 2 SCC 25) wherein it has been held that the technicalities of law cannot come in the way when justice is pitted against the technicalities of law. The courts are required to do justice and see if there is a necessity for permitting the party to take a plea so as to decide the real controversy between the parties, the amendment is required to be allowed. The Hon'ble Supreme Court in one of the cases referred above permitted amendment of the plaint so as to convert the suit filed for relief of injunction to be converted into suit for specific performance of contract. The Hon'ble Supreme Court also in one of the cases referred above held that on the basis of the admitted case or on the basis of the facts, the amendment seeking a new relief can be allowed. The object is to decide the real controversy between the parties and the Hon'ble Supreme Court in the case of G. Nagamma (supra) held that even inconsistent pleas are permissible and can be taken by way of amendment. In view of the above reasons, the application filed under Article 226(3) of the Constitution of India may be dismissed.

I considered the submissions of learned counsel for the parties and perused the facts of the case.

The facts, which are not in dispute as referred above are required to be mentioned again that a suit for specific performance of contract was filed in the trial court on 23rd Jan., 1982. In the plaint there is a clear admission of the plaintiff that the defendants refused to execute agreement in writing despite plaintiff's insistence. This plea is not being explained nor its deletion has been sought. Said plea will remain as it is even if the amendment is allowed. By amendment the plaintiff is seeking to plead that a written agreement was executed by one of the trustee. The written agreement of the year 1980 saw the light of the day only in 2006 when plaintiff submitted an application for taking on record the said agreement on record in the trial court and that too when his admission in plaint is that in spite of plaintiff's insistence for written agreement, the defendants refused to execute written agreement.

It is true that inconsistent plea may be pleaded but there cannot be pleas destroying each other to this extent as is in the case in hand. It is not a case of taking inconsistent plea, but virtually asking the court to allow the plaintiff to plead two facts out of one alone can be proved and from the plaintiff's own evidence one will be proved to be false even if no defence is taken by the defendants. It is also true that the amendment can be allowed at any stage, but that does not mean that it give any right to any

litigant to seek amendment as a matter of right as is being sought for in this case. The plaintiff in the application filed under Order 6 Rule 17 CPC gave only ground to explain delay of 24 years that the plaintiff "by mistake" and "by over site" failed to mention this fact of written agreement dated 21st Feb., 1980 in the plaint. It is strange that in the entire application there is not a single word how a fact of 1980 which was most material and relevant fact remained un-noticed and was not pleaded in the plaint by over site for 24 years.

To explain this, learned counsel for the petitioner orally submitted, during dictation of the order, that the reasons were already given in the application filed before the trial court for taking on record the document dated 21st Feb., 1980, which was filed in the trial court and learned counsel for the respondents pointed out that in the writ petition the petitioner mentioned this fact and also submitted the copy of the application, which may also be considered. Be that as it may be, the fact is that the petitioner's said application for taking on record the said document was dismissed by the trial court is admitted fact. There was no reason for not pleading these facts in this application, but even if this fact is ignored then the explanation which is given for not mentioning the fact of written agreement in the original pleading is that on 20th Sept., 2006 when the plaintiff met with his counsel on 14th Sept., 2006 for preparing for his evidence then he found from the case file of counsel for the petitioner's-plaintiff that original agreement dated

21st Feb., 1980 executed on behalf of the defendants was not in the file of learned advocate nor it was having any mention in the list of documents, which were filed in the trial court. The plaintiff thereafter, searched this document and found from his own files that the document in question remained in another file. That explanation is about plaintiff's belated knowledge of not filing of document in court and no explanation for not pleading the fact in plaint or amend plaints. It is no explanation of delay in seeking amendment of plaint. The plea taken by the plaintiff in the year 2006 about the fact of execution of agreement by or on behalf of alleged vendor on 21st Feb., 1980 clearly shows that said plea has been taken as afterthought only because of the plain and simple reason that the plaintiff's own case is only that alleged agreement was in his possession from very beginning as well as was with him when he filed the suit and certainly remained in his possession. There is no explanation why the fact was not pleaded by the plaintiff in original pleading as pleading of fact is not dependent upon the availability of document when plaintiff himself was party to said agreement. It will be worthwhile to mention here that the plaintiff remembered all the terms of the oral agreement dated 2nd April, 1978 for more than three years till 21st Nov., 1982 when he filed the suit but he failed to remember that a written agreement was executed, which is two years before filing of the suit by the plaintiff. Not only this, the plaintiff twice sought amendment of the

plaint then he must have looked into and must have read the facts pleaded in the plaint. The plea of the plaintiff that the said fact remained un-noticed for 25 years, deserves to be rejected summarily and the latitude which is sought by the petitioner-plaintiff on the ground that he being the plaintiff cannot delay the suit, appears to be virtually abuse of the process of the court as in very many cases the liberal views are taken to do the justice and which is sought to be used in this case as tool for delaying the suit proceedings. The courts are required to see pith and substance and required to do justice and for that purpose, must act firmly and must see reason for taking sympathetic view by court in the cases decided as well the facts of the decided cases so that they may be properly applied to do justice and not to deny the justice. The petitioner failed to give any reason by which he can plead both; that the "defendants refused to execute the written agreement" and "defendants executed written agreement". That too, in a case, where there is no prayer of the plaintiff even for explain the earlier admission nor plaintiff is seeking permission to withdraw the admission made in pleadings.

It is true that matter is listed before this Court for deciding the application filed under Article 226(3) of the Constitution of India. Learned counsel for the petitioner rightly pointed out that the writ petition is Article 227 of the Constitution of India. It is supervisory jurisdiction of this Court. This Court can pass any

appropriate order which is just and proper in the facts and circumstances of the case and because of these glaring facts, this Court do not find any reason to wait for service of the rest of the respondents who are defendants only and in whose favour the order of the trial court is there. The frivolous litigation is required to be nipped in the bud as early as possible and therefore, this Court deems it proper to dismiss the writ petition itself with a special cost of Rs.10,000/- for contesting respondent.

After dictation of the order in court at this stage, the learned counsel for the petitioner sited two more judgments in addition to the above judgments. Learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court delivered in Ramchandra Sakhram Mahajan Vs. Damodar Trimbak Tanksale (D) & Ors reported in 2007(3) CCC 94 (SC) wherein the Hon'ble Apex Court held that plaintiff's prayer for second amendment in the plaint to make his claim more precise so as to enable the Court to adjudicate upon it more satisfactorily ought to have allowed enabling the trial court to decide the dispute in a more satisfactory manner. The Hon'ble Supreme Court has further held that the delay in seeking amendment can be compensated by awarding costs to the contesting defendants. In above case, the amendment was sought "to pin point the disputed property with better particulars". This amendment was refused by the trial court and in that fact situation, the Hon'ble Supreme Court held that the

plaintiff's above amendment would have enable the court to adjudicate the dispute more satisfactorily and, therefore, in that situation, the amendment should not have been refused on the ground of delay. The facts of this case are just contrary to the facts of case of Ramchandra Sakhram Mahajan (supra) in asmuch as by this amendment, the plaintiff is not making the facts clear but seeking to incorporate the plea,which not only goes against the plaintiff's own pleading but is against pliantiff's admission in the plaint The bonafides of plaintiff in seeking amendment after 25 years when one of the attesting witness died and all the defendants are of very old age clearly shows that the plaintiff-petitioner wants to take help of the liberal approach taken in the matter of allowing amendment sought after delay.

Another important judgment of the Hon'ble Supreme Court, which is recent one is delivered in the case of Usha Balashaheb Swami & Ors. Vs. Kiran Appaso Swami & Ors. reported in 2007(2) WLC (SC) Civil 120. The Hon'ble Apex Court in the above judgment considered various earlier judgments of Hon'ble Supreme Court including the judgment delivered in the case of Basavan Jaggu Dhobi Vs. Sukhnandan Ramdas Choudhary (Dead) reported in 1995 Supp. (3) SCC 179. In that case, the defendant initially taken up the stand that he was a joint tenant alongwith others. Subsequently, he submitted that he was a licencee for monetary consideration who was deemed to be a tenant as per the provisions

of Section 15A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The Hon'ble Supreme Court in Usha Balashab Swami's case took note of observation of the Hon'ble Supreme Court from the case of Basavan Jaggu Dhobi's wherein it was observed :

> *"As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his statement under Order 6 Rule 17 CPC by taking a contrary stand than was stand originally in the written statement. This is opposed to the settled law open to a defendant to tak even contrary stands or contradictory stands, the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action."*

After considering said observation of the Hon'ble Supreme Court in Basavan Jaggu Dhobi's case, the Hon'ble Supreme Court in Usha Balashaheb Swami's case (supra) held as under: -

> *"22. Keeping these principles in mind, namely, that in a case of amendment of a written statement the Courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed....."*

In view of the above judgment also it is clear that principle which can be applied when amendment is sought of a written

statement are different than the principle which can be applied when amendment is sought in plaint. I need not to enumerate more reasons in view of the reason that Hon'ble Apex Court has already held so in the judgment of Basavan Jaggu Dhobi's case as well as in Usha Balashaheb Swami's case.

The Hon'ble Supreme Court in Usha Balashaheb Swami's case further considered the important legal issue whether the admission made in the pleading can be withdrawn. In Heera Lal Vs. Kalyan Mal & Ors reported in 1998(1) SCC 278, the Hon'ble Apex Court observed as under: -

> "*In our view, the order passed by the High Court under Section 115, CPC, allowing withdrawal of earlier admissions of defendant nos. 1 and 2 in their original written statement about 5 out of 7 items of Schedule-A properties cannot be sustained. The reason is obvious. So far as Schedule-A properties were concerned, a clear admission was made by defendant nos.1 and 2 in their joint written statement in 1993 that 7 properties out of 10 were joint family properties wherein the plaintiff had 1/3rd share and they had 2/3rd undivided share. Once such stand was taken, naturally it must be held that there was no contest between the parties regarding 7 items of suit properties in Schedule-A. The learned Trial Judge, therefore was perfectly justified in framing Issue No.2 concerning only remaining three items for which there was dispute between the parties In such a situation under Order XV Rule 1 of CPC the plaintiff even would have been justified in requesting the court*

to pass a preliminary decree forthwith qua these 7 properties. The said provision lays down that .'where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce the judgment.' Even that apart, the defendants-respondent did not think it fit to move any amendment application for getting out of such admission till the plaintiff moved an application for appointment of receiver regarding admitted items of properties. It is only thereafter that the application for amendment was moved. Learned Trial Judge was right when he observed that even the ground made out in the application were not justified. Consequently, there is no question of taking inconsistent stand which would not have affected prejudicially the plaintiff as wrongly assumed by the High Court."

Since in Usha Balashaheb Swami's case the Hon'ble Supreme Court in para no.25 found that "*.....it was not a case of withdrawal of the admission by the appellants by making the application for amendment of the written statement but n fact such admission was kept intact and only a proviso has been added. This, in our view, is permissible in law and the question of withdrawing the admission made in para no.8 in its entirety in the facts as noted herein above, therefore, cannot arise at all.*"

In Usha Balashaheb Swami's case in written statement the defendants admitted that plaintiff and defendants nos. 1 to 7 were jointly entitled to half share of the suit properties, but by amendment in the written statement, the defendants sought to add

that plaintiff and defendants nos. 2 to 7 could not acquire right, title and interest in the joint family properties as they were illegitimate children of the deceased Appasao. By amendment, the appellant sought to allege that Appasao (since deceased) was initially married to defendant no.1. As she had no issue, the said Appasao took defendant no.2 as his second wife after coming into force of the Hindu Marriage Act, 1955. The appellants alleged that since the marriage between Appasao and defendant no.2 was a nullity, neither defendant no.2 nor the plaintiff and defendant nos. 3 to 7 were entitled to claim any share in the suit properties. This amendment sought by the defendants appears not to be so inconsistent with their original pleadings, but for validity of marriage, the rights of the parties remains as it is as originally pleaded by the defendant in the written statement. Therefore, it appears that Hon'ble Supreme Court observed that it is not a case of seeking withdrawal of admission. In this case as stated above, the amendment is not only for contradictory pleas, but by amendment, the plaintiff wants to set up a written agreement in place of oral agreement after 24 years of filing of the suit, which certainly prejudicial to the interest of the defendants and the delay of 24 years also may aggravate the prejudice to the defendants and that may be because of their old age. In a case where plaintiff is seeking amendment who normally is presumed to be interested in expeditious disposal of his suit but it is not the fact situation here in

this case. Secondly, the amendment has been sought by the plaintiff and not by the defendant, therefore also, the liberal approach as stated by the plaintiff cannot be of the court, which could have been in the matter of seeking amendment of written statement in view of the decision of the Hon'ble Supreme Court referred above. Thirdly, the reason for not pleading the fact in the plaint are absolutely frivolous because of the reason that non-availability of document in the file of learned Advocate cannot be a reason for not pleading the fact for 24 years and lastly the stand taken by the plaintiff for the amendment is contradicting his admission in the plaint.

In view of the above, the writ petition is dismissed with the cost as mentioned above and the stay order dated 12.2.2007 is vacated. The trial court shall decide the suit as early as possible.

(PRAKASH TATIA), J.

c.p.goyal/-